

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

EVAN FRANCIS, JR.,	::	MOTION TO VACATE
Movant,	::	28 U.S.C. § 2255
	::	
v.	::	CRIMINAL NO.
	::	1:11-CR-0391-RWS-RGV-5
UNITED STATES OF AMERICA,	::	
Respondent.	::	CIVIL ACTION NO.
	::	1:18-CV-1323-RWS-RGV

**FINAL REPORT AND RECOMMENDATION**

This matter has been submitted to the undersigned Magistrate Judge for consideration of Evan Francis’s pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. [Doc. 379]. For the reasons that follow, the undersigned finds that this § 2255 motion is time barred and **RECOMMENDS** that this action be **DISMISSED** pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings (hereinafter “Rule 4(b)”).<sup>1</sup>

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<sup>1</sup> Rule 4(b) provides that: “If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party.” See also Edwards v. United States, 295 F. App’x 320, 321 (11th Cir. 2008) (per curiam) (affirming district court’s sua sponte denial of § 2255 motion as time-barred).

## I. PROCEDURAL HISTORY

A federal grand jury in the Northern District of Georgia returned a two-count indictment against Francis and six co-defendants, charging Francis in Count One with conspiracy to possess with the intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)(ii), and in Count Two with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). [Doc. 1]. Represented by retained counsel Cathy Alterman (“Alterman”), Francis entered a negotiated guilty plea to both counts. [Doc. 181]. On September 4, 2013, the Court entered judgment, imposing a total sentence of 121 months of imprisonment. [Doc. 295]. Francis did not file a direct appeal.

Francis filed this pro se § 2255 motion on March 12, 2018.<sup>2</sup> [Doc. 379 at 12]. As grounds for relief, Francis argues that Alterman was ineffective for failing to object that his military service was not included in the presentence investigation report, that the probation officer erred in not providing proof of his military service at sentencing,

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<sup>2</sup> Pursuant to the “mailbox rule,” a pro se prisoner’s motion to vacate is deemed filed on the date it is delivered to prison authorities for mailing. 28 U.S.C. foll. § 2255, Rule 3(d); see also Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001) (per curiam). Absent evidence to the contrary, the Court assumes that the motion was delivered to prison authorities on the day the prisoner signed it. Washington, 243 F.3d at 1301.

and that he is entitled to a two-level sentence reduction or a downward departure based on his military service. [Id. at 4-5; Doc. 379-1 at 3-5].

## II. DISCUSSION

A § 2255 motion is subject to a statutory one-year limitation period, which runs from the latest of the following:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). In this case, there is no claim that the circumstances set forth in subparagraphs (2) through (4) of § 2255(f) apply.

Francis's conviction became final, for purposes of § 2255(f)(1), on September 18, 2013. See Fed. R. App. P. 4(b)(1)(A)(i), (6) (providing that a defendant's notice of appeal must be filed within fourteen days after the written judgment of conviction is entered on the criminal docket); see also Ramirez v. United States, 146 F. App'x

325, 326 (11th Cir. 2005) (per curiam) (For § 2255 statute of limitations purposes, “a judgment of conviction becomes final when the time for filing a direct appeal expires.”) (citation omitted). Because Francis did not file his § 2255 motion until March 12, 2018, approximately four and a half years after his conviction became final, it was not timely under § 2255(f)(1).

Francis does not contend that he is actually innocent and has not alleged extraordinary circumstances that might excuse the late filing of his § 2255 motion. See McQuiggin v. Perkins, 569 U.S. 383, 386, 401 (2013) (A plea of actual innocence can overcome the one-year limitations period for filing a federal habeas corpus action if the movant “presents ‘evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.’” (citing Schlup v. Delo, 513 U.S. 298, 316 (1995)); Outler v. United States, 485 F.3d 1273, 1280 (11th Cir. 2007) (per curiam) (“The statute of limitations can be equitably tolled where a petitioner ‘untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.’”) (citation omitted). Accordingly, this § 2255 motion is due to be dismissed as untimely.

### **III. CERTIFICATE OF APPEALABILITY**

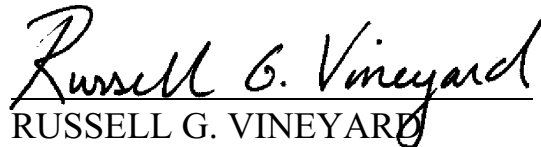
Rule 22(b)(1) of the Federal Rules of Appellate Procedure provides that an applicant for § 2255 relief “cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).” Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts provides, “The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Section 2253(c)(2) of Title 28 states that a COA shall not issue unless “the applicant has made a substantial showing of the denial of a constitutional right.” A movant satisfies this standard by showing “that reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Because the dismissal of Francis’s § 2255 motion as time barred is not debatable by jurists of reason, the undersigned recommends that he be denied a COA.

#### IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that Francis's § 2255 motion, [Doc. 379], be **DISMISSED** pursuant to Rule 4(b) and that a COA be **DENIED**.

The Clerk is **DIRECTED** to terminate the referral of the § 2255 motion to the Magistrate Judge.

**SO RECOMMENDED**, this 17th day of April, 2018.

  
RUSSELL G. VINEYARD

UNITED STATES MAGISTRATE JUDGE